FILED
MAR 7 1932

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 265.

L. A. NIXON,

Petitioner,

against

JAMES CONDON and C. H. KOLLE,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITIONER'S REPLY BRIEF.

JAMES MARSHALL,
NATHAN R. MARGOLD,
ARTHUR B. SPINGARN,
FRED C. KNOLLENBERG,
E. F. CAMERON,
Petitioner's Counsel.

N. H. KUGELMASS,
On the Brief.

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L. A. NIXON,
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against
JAMES CONDON and C. H. KOLLE,
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PETITIONER'S REPLY BRIEF.

POINTS.

I.

Under the statutes as they existed prior to the adoption of Chapter 67 of the Laws of 1927 there was no inherent power in the party to exclude the petitioner from the primaries. The power to do so was solely derived from Chapter 67 of the Laws of 1927.

In petitioner's Main Brief it is argued (pp. 18-28):

(a) The Legislature intended the Democratic Party to exercise the powers granted in Chapter 67, Laws of 1927, in such a way as to keep Negroes from participating in Democratic primaries and thereby restore the *status quo ante Nixon* v. *Herndon*. For this purpose the party was the agent of the Legislature; there was a clear chain of causation from the legislative act to the discrimination against the petitioner.

(b) Any inherent power which the party may have had to determine the character of its membership was destroyed by the sovereign acts of the Legislature in adopting Article 3093-a in 1923 and Chapter 67 of the Laws of 1927.

In view of the argument made in respondents' brief with respect to inherent power the petitioner now proposes to show that **even before the adoption of the statutes** of 1923 and 1927 the Legislature had completely expressed its sovereignty and that no inherent power to determine party membership or primary participation remained in the political parties.

Respondents' position is based upon the contention that Article 3093-a (the old Article 3107) having been declared unconstitutional in *Nixon* v. *Herndon,* it must be deemed to have been null and void and that consequently the State never interfered with the inherent powers of the Democratic Party. From this premise respondents argue that Chapter 67 of the Laws of 1927 did not grant any new powers, did not add to the inherent powers of the party, but merely created a limitation upon the existing powers by prohibiting a political party from excluding any person "because of former political views or affiliations, or because of membership or non-membership in organizations other than the political party" (p. 8).

There are a number of answers to this argument.

First. The words of the statute are themselves a grant of power, to wit: "Every political party * * * shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party; * * *."

Even had there been no necessity for such a grant of power to the political party the State purported to exercise its sovereignty and to give the party the benefit of statutory support.*

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*A full discussion of this proposition is in Petitioner's Main Brief, pp. 18-28.

Secondly. Even prior to the Act of 1923 the State had defined party powers and who might vote in party primaries. In consequence, the limitation contained in Chapter 67 of the Laws of 1927 was not a limitation upon inherent powers already existing in parties, but was a limitation necessitated by the grant to the Executive Committee of the power to determine party membership. This is readily demonstrable by a reference to the statutes.

The list of voters eligible to participate in a party primary is determined by Article 3121, *Texas Revised Civil Statutes*, 1925, which article goes back as far as 1905. It provides that the county tax collector shall deliver to the chairman of the county executive committee of each political party for use in its primary elections certified lists of the qualified voters of each precinct of the county, and that the chairman of such executive committee shall place this list for reference in the hands of the election officers of each election precinct before the polls are opened.* Article 3121 then goes on to provide:

> "No primary election shall be legal, unless such list is obtained and used for reference during the election. Opposite the name of every voter on said list shall be stamped, when his vote is cast, with a rubber or wooden stamp, or written with pen and ink, the words 'Primary—Voted,' with the date of such primary under the same."

The qualified voters are defined in Article 2955** as every person twenty-one years of age who shall have been a citizen of the United States and have resided in the State one year next preceding the election and six months within the district or county where he offers to vote and who is not subject to the disqualifications of Article 2954, which include infancy, idiocy, pauperism, conviction of felony and membership in the military forces of the United States.

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* The list of voters eligible to vote at general elections is similarly prepared by the tax collector under Article 2975.

** Article 2955 was in its present form in 1923.

Section 2955 makes as a further necessary qualification for voting the payment of a poll tax, and the section concludes by providing:

> "The provisions of this article as to casting ballots shall apply to all elections, including general, special and primary elections."

The only limitation before that contained in the resolution of the Democratic Party upon the persons eligible to vote in primaries as listed by the county tax collector pursuant to Article 3121, is that contained in the test on the ballot set forth in Article 3110,* which reads as follows:

> "ART. 3110. *Test on ballot.* No official ballot for primary election shall have on it any symbol or device or any printed matter, except a uniform primary test, reading as follows: 'I am a..... (inserting name of political party or organization of which the voter is a member) and pledge myself to support the nominee of this primary'; and any ballot which shall not contain such printed test above the names of the candidates thereon, shall be void and shall not be counted."

It has been held by the Texas courts that except for the possible further limitations resulting from Article 3107 the test contained in Article 3110 is the sole test which may be applied to a participant in the primary whose name appears upon the tax collector's list.

> *Briscoe* v. *Boyle,* 286 S. W. 275, quoted with approval in *Love* v. *Wilcox,* 28 S. W. (2d) 515, 119 Tex. 256.
>
> *Westerman* v. *Mims,* 111 Tex. 29, 227 S. W. 178.
>
> *Clancy* v. *Clough,* 30 S. W. (2d) 569.
>
> *Friberg* v. *Scurry,* 33 S. W. (2d) 762.

In *Love* v. *Wilcox, supra,* the Supreme Court of Texas went into the history of Article 3110 and Article 3107 and

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* This article was Article 3096, Revised Statutes of 1911.

its predecessor, and it is clear that it did not deem Article 3107 to supersede Article 3110. With reference to Article 3107, the Court said (p. 522), by Greenwood, J.:

> "The committee's discretionary power is further restricted by the statute directing that a single, uniform pledge be required of the primary participants."

Thus neither voters nor candidates can be deprived of participation in primaries because they have previously violated their pledge of party loyalty, and the Court made it plain, at page 525, with respect to Article 3107, "that the Legislature intended the same qualifications to be prescribed by the State Committee for *all* participating in a party primary, whether as voters or candidates, and further that the same qualifications must be prescribed for all candidates." (Italics Court's.)

These sections illustrate how fully the State had occupied the field in determining who might vote at party primaries prior to the adoption of Article 3107 old and new.

The tax collector's list had to be used in order to make the primary election legal. Anyone on the list who made the test statement was authorized to vote. With that exception his qualifications were the same as those of voters in a general election. What is true in this respect as to voters is equally true of candidates in primaries (*Love* v. *Wilcox, supra*).

Where, then, was there room for the party to exercise inherent power to add to or whittle away the prerequisite qualifications of primary voters? If the judge of election had permitted anyone to vote at a primary whose name did not appear on the list of qualified voters of the precinct or who failed to present his poll tax receipt or certificate of exemption or to make an affidavit of its loss, the judge of election would have been subject to a fine of not exceeding $500 (Art. 216, *Texas Penal Code*, 1925).

There is no indication in this penal statute that the voting list could lawfully be enlarged by the political parties.

And *per contra,* if the judge of election had refused to receive the vote of any qualified elector who when his vote was objected to showed by his own oath that he was entitled to vote, such judge of election must be fined not to exceed $500 (Art. 217, *Texas Penal Code,* 1925).*

There is no suggestion here either that if the judge of election relied upon action of the party executive committee in restricting the list of eligible voters he would be immune from fine. Only in Article 3107 is there any suggestion in the law of Texas that parties can detract from the list of voters as certified by the tax collector:†

The power to eliminate Dr. Nixon from the primaries because of his color is traceable only to Chapter 67 of the Laws of 1927. That statute alone released the only force which could bar him from the primaries. The record shows that he was a citizen who had paid his poll tax and in every other respect was entitled to vote and that his name had been duly certified by the tax collector as a qualified voter (R. 1, 2). He thus automatically came within the provisions of Article 3121. He offered to take the pledge provided for in Article 3110. There was no justification, therefore, to deny him the right to vote, excepting that claimed under Chapter 67 of the Laws of 1927 and the resolution of the Democratic State Executive Committee, which was the issue of that statute. The un-

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* This penal provision is made applicable to primary as well as general elections by Article 231.

† Although there is no statute which penalizes a person for casting his primary ballot contrary to the terms of the resolution of the Democratic Party, the Court is referred to Article 236 of the *Texas Penal Code.* By the terms of this article, any person who votes in a primary election when he is not qualified to vote "at the next State, county or municipal election * * *" shall be fined "not exceeding five hundred dollars or be imprisoned in jail not exceeding sixty days or both." So that a person who is not entitled to be on the tax collector's list votes at his peril. This again illustrates that the fundamental basis of the right to vote is the right to be on the tax collector's list and not the resolution or mandate of the political party.

constitutional discrimination against the petitioner was consequently in direct sequence from the act of the Legislature.

II.

Even if a political party be a voluntary association, it is clear not only (a) that it is subject to the sovereignty of the State, but also (b) that it can become an instrumentality of the State.

To this effect is *Lawton* v. *Steele,* 152 U. S. 133, which held constitutional a statute of New York which authorized any person summarily to destroy certain nets in the waters of the State and provided that no action for damages should lie against any person on account of such seizure or destruction.

In that statute, as in Chapter 67 of the Laws of 1927 of Texas, there was nothing mandatory, nothing which required the individual in the one case or the political party in the other instance to act under the statute.

Just as in *Lawton* v. *Steele* the State had the power to vest private individuals with its police powers, so here the State could vest in political parties the power to determine party membership if that power did not involve discrimination by reason of race.

Other instances in which States have made private corporations or persons their agents are those in which they have vested authority in societies for the prevention of cruelty to children and animals.

See *Freund on Police Power,* Secs. 523, 527, 534.

In other fields, also, the State has vested its powers in individuals and corporations, the most noteworthy examples being in the field of condemnation.

Clark v. *Nash,* 198 U. S. 361.

Strickland v. *The Highland Boy Mining Co.*, 200 U. S. 527.

Offield v. *N. Y., N. H. & H. R. R. Co.*, 203 U. S. 372.

It is clear from these cases that a private individual, group or corporation can for certain purposes become an agency of the State vested with State powers, including the police power and the power to condemn private property.

There should be no difficulty in treating the respondents as judges of elections and the political parties themselves as the recipients of State powers.

That they are subject to the sovereignty of the State is clear from the Texas authorities cited on page 4, *supra*.

III.

The election laws define and limit in meticulous detail the principal functions of political parties. This exercise of sovereignty has deprived the parties of their independence of action.

There is no general definition of a political party in the Texas statutes. Nor is there any attempt to state the manner in which political parties may be created. It may be conceded that political parties in the common sense of the term have been associations of persons banded together to proclaim and achieve their political ideals, and political parties may exist without statutory authority and sometimes even without statutory control. Thus, for example, an organization such as the National Women's Party or a league of voters or a Blank for President Club may organize and make propaganda for their principles without State interference.

When, however, political parties come to the polls, when an organized effort is made to choose public officials through the State machinery of elections, political parties

have been subjected by the Texas Legislature to its sovereign control and defined in so far as concerned their functions and powers as a part of the electoral system. Thus, throughout the election laws certain duties are placed upon political parties, certain limitations of powers are prescribed, their government and organization are set forth, and their functions as a part of the electoral machinery of the State clearly established.

The principal functions of a political party are fivefold:

1. To select the social and political principles to the support of which the members dedicate themselves.
2. To select its officers and administration.
3. To select the candidates whom the party members wish to support at the general election.
4. To collect and expend moneys for campaign purposes.
5. To determine the membership of the party.

An examination of the Texas Election Laws reveals that the Legislature has taken steps to regulate every one of these principal functions. In each instance the Legislature has withdrawn sole control of these matters from the parties.

1. *Party platforms.*

By Article 3139 the time of holding State Conventions and the organization of such conventions "to announce a platform of principles" are provided for.

Article 3133 requires a referendum on all platform demands for specific legislation on any subject, the parties being prohibited in convention from placing such planks in their platforms "unless the demand for such specific legislation shall have been submitted to a direct vote of

the *people,* and shall have been endorsed by a majority of all the votes cast in the primary election of such party; provided, that the State executive committee shall, on petition of ten per cent. of the electors of any party, as shown by the last primary election vote, submit any such question or questions to the voters at the general primary next preceding the State convention." (Italics ours.)

2. *The selection of party officers and party administration.*

Article 2940 describes the persons who are disqualified from acting as chairman or members of any executive committee of a political party and from acting as judge, clerk or supervisor of any election.

The appointment of supervisors of general and primary elections is provided for in Articles 2939 and 2941. They must be qualified voters in the district and they are appointed by the chairman of the county executive committee for each political party that has candidates on the official ballot. Both the election officials, the county chairman and the members of the county executive committee of the political parties must have paid their poll tax, and the supervisors must have endorsed upon their certificate of nomination the approval of the county judge.

The judges of election at general elections must be of different political parties and selected by the Commissioners' Court* (Arts. 2937, 2938).

The presiding judges of primary elections must be chosen by the party county executive committee and such presiding judges must choose their associate judges and clerks. Judges, clerks and supervisors of primaries are all required to take the *"oath required of such officers in general elections"* (Art. 3104).

The time of holding primaries is provided for by statute (Art. 3102), except that "nominations of candidates to be

* The Commissioners' Court is composed of the county judge and county commissioners. Its duties are similar to those of county overseers and supervisors in other States (Arts. 2342 *et seq.*).

voted for at any special election shall be made at a primary election at such time as the party executive committee shall determine, but no such committee shall ever have the power to make such nominations."

The place where the primary vote is to be held is regulated by Article 3103.

The primary officials and the nature of their oath are prescribed by Article 3104.

The powers of judges of primaries are set forth in Article 3105.*

It is provided in Article 3109 that "the vote at all general primaries shall be by official ballot," and the contents of the official ballot and its printing by the county committee and the furnishing of the official ballot to the presiding officer of the primary are described in Article 3109.

The method by which the official ballot is made up by the primary committee, which is a subcommittee of the county committee in each county, is set forth in Articles 3111, 3113, 3114 and 3115.

The order of names on the ballot is prescribed (Art. 3117).

The manner of election of the county chairmen "by the qualified voters of the whole county," of the precinct chairmen by the qualified voters of their respective election precincts, and the other county party officers, is set forth in detail in Article 3118, and it is provided that "the list of election precinct chairmen and the county chairmen so elected shall be certified by the county convention to the county clerk along with the other nominees of said party."

The executive committee's responsibility for the distribution and general supervision of the supplies necessary for holding a primary is set forth in Article 3119.

The canvassing of the results is provided for in Article 3125; the delivery of the ballot boxes to the county clerk in Article 3128.

County and precinct conventions are also provided for (Art. 3134), district conventions (Art. 3135), State con-

* See Petitioner's Main Brief, discussion of authority vested in judges of election, pp. 36-39.

ventions (Arts. 3136, 3138, 3139), and the canvassing of primary returns by the State committee (Art. 3137).

Article 3141 sets forth the vote to which each county is entitled in the State or district conventions, to wit, one vote for each five hundred votes or major fraction thereof cast for the candidate for governor of the political party holding the convention, "at the last preceding primary election."

It is thus the "primary election" that determines, under the statute, the basis for representation in the very conventions of a party.

Even the provisions with respect to primary contests (Arts. 3146-3153) apply to selecting the delegates to the party conventions.

The Texas courts have held that the statutes are supreme with respect to the qualifications of candidates for party executive committee; that past disloyalty to the party cannot disqualify one seeking the position of executive committee member.

Clancy v. *Clough* (Tex. Civ. App.), 30 S. W. (2d) 569.

Friberg v. *Scurry* (Tex. Civ. App.), 33 S. W. (2d) 762.

In *Clancy* v. *Clough*,* *supra*, Pleasants, C. J., said at page 572:

> "The wisdom of our primary election statutes, which, in a large measure, *take away from political parties all control of the machinery by which they select their candidates for public office,* may well be doubted, but the authority of the Legislature to enact these statutes has been upheld by our courts, and *all primary elections are required to be held in accordance with the general provisions of these statutes, except as to matters which the statutes themselves leave to the discretion of some other authority.* These primary election statutes prescribe all the requisites of an application to have one's name placed upon the official ballot as a can-

* Cited with approval in *Love* v. *Wilcox*, *supra*.

didate, and the pledge to be placed on the ballot. Revised Statutes, arts. 3111 and 3110." (Italics ours.)

It would seem to follow inevitably that if a party is without inherent power to determine its internal organization or its platform, it cannot have inherent power as to the qualifications of voters.

3. *The selection of candidates.*

The provisions already referred to are for the most part applicable likewise to the selection of party candidates. To this effect are the cases cited *supra,* page 4.

Article 3111 specifically deals with the method by which candidates shall have their names placed upon the official ballot for a general primary election.

4. *Expenses of primaries.*

The expenses of the primaries and the division of the cost of the primary among the candidates are outlined in Article 3108, and it is provided in Article 3116 that no person's name shall be placed on the primary ballot unless he has paid the amount of the estimated expense for holding the primary which has been apportioned to him by the county committee.

An itemized statement of the candidate's expenses must be filed (Art. 3144).

Article 3145 requires a similar statement by every manager of any political headquarters or anyone expending money or giving property or promises of influence in aid of any candidate.

Chapter Eight, Title Six, of the *Texas Penal Code* deals with limitations on expenditures in primary elections and contains penal sanctions.

5. *Determination of party membership.*

As has already been stated, the Legislature, even before the adoption of Article 3093-a in 1923 and of the present Article 3107 by Chapter 67, Laws of 1927, had deter-

mined what the qualifications of primary voters were to be (*supra,* pp. 1-7). The qualified voters of the State as determined by Article 2955 were to be listed by the tax collector and such list was to be delivered to the primary officials pursuant to Article 3121. Delivery and use of such list at the primary election were the *sine qua non* of a legal primary election. This list was the basis of determining primary voters and all persons on that list were entitled to vote if they signed the test on the ballot as provided by Article 3110.

Briscoe v. *Boyle* (Tex. Civ. App.), 286 S.W. 275.*

Only the statute under consideration in this case gives to the party any authority over the primary voters.

It is apparent, then, that the Legislature has invaded the entire field of nomination of candidates by primary and otherwise. This sovereignty has been wielded pursuant to the requirement of Section 4 of Article VI of the Texas *Constitution,* which provides that the Legislature shall "make such other regulations as may be necessary to detect and punish fraud and preserve the purity of the ballot box."

It must be clear, therefore, that political parties in the State of Texas, however defined, in whatsoever manner or for whatever purpose they may come into being, have in their relation to primary and other elections only such powers, such duties and privileges, as the statutes give them. This does not mean that in respect to other functions and enterprises of the political party, such as its social activities and its charitable works, it need admit all qualified voters. With these matters the State has not expressed its concern. They are not necessarily or directly related to the expression of that popular will which is the basis of democratic government.

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* Cited with approval in *Love* v. *Wilcox, supra.*

IV.

The statute was principally aimed at Democratic Primaries.

Respondents on page 15 of their brief take exception to the statement in the footnote to petitioner's main brief on page 16 that "the Democratic Party, being the only party polling over 100,000 votes in Texas, was the only party required by law to hold primary elections."

While on two occasions, to wit, in 1926 and 1930, the Republican Party held primaries in the State of Texas because it polled over 100,000 votes in 1924 and 1928, nevertheless at the time of the adoption of Section 3107 in 1927 only the Democratic Party was required to hold a primary, and only the Democratic Party did hold a primary in the year 1928.

Counsel for petitioner have been informed by E. C. Toothman, Secretary and Director of Organization of the Republican Party in Texas, that in the 1926 primaries the Republicans polled 15,289 votes as against 821,234 votes cast in the first Democratic primary of that year and 766,318 votes cast in the Democratic run-off primary. In 1930 there were approximately 10,000 votes cast in the Republican primary, whereas in the Democratic primary 833,442 votes were cast and in the Democratic run-off primary of that year 857,773 votes were cast.

Even in those years when the Republicans held primary elections the real primary and the real election for State officials were in each instance the *Democratic* primary. It is the only possible inference from this that the legislative purpose in enacting Chapter 67, Laws of 1927, was to enable the Democratic State Executive Committee to eliminate Negroes from effective participation in elections, as the Legislature itself attempted to do in the void Act of 1923.

It is respectfully submitted that the judgment appealed from should be reversed, and the cause remanded for trial upon the merits.

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